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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 9, 2006

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: WESTLAKES UTILITY CORPORATION
TCEQ DOCKET NO. 2006-0884-MWD**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Request for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott A. Humphrey".

Scott A. Humphrey, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512/239-6363

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TCEQ DOCKET NO. 2006-0884-MWD

**IN THE MATTER OF THE
APPLICATION BY WESTLAKES
UTILITY CORPORATION FOR
TPDES PERMIT NO.
WQ0014658001**

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§
§
§
§

**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

CHIEF CLERK'S OFFICE

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO REQUEST FOR HEARING**

**TO THE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY:**

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Request for Hearing in the above-referenced matter and would respectfully show the following:

I. INTRODUCTION

Westlakes Utility Corporation (Westlakes or Applicant) has applied to the TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) Permit. The proposed permit would authorize the discharge of treated domestic wastewater from an annual average flow not to exceed 330,000 gallons per day (gpd) in the interim I phase, 660,000 gpd in the interim II phase and 990,000 gdp in the final phase. The proposed wastewater treatment facility will serve a residential development. The facility will be located 2,000 feet west of Loop 1604 and approximately 1,000 feet south of Farm-to-Market Road 143 in southwest Bexar County, Texas.

The Westlakes Medina River Wastewater Treatment Facility will be an activated sludge process plant operated in the extended aeration mode. Treatment units will include aeration basins, grit removal, final clarifiers, aerobic digesters and chlorine contact chambers for all phases. The facility has not been constructed. The effluent limitations of the draft permit for all

phases, based on a 30-day average, are 10mg/l five-day Carbonaceous Biochemical Oxygen Demand (CBOD₅), 15 mg/l Total Suspended Solids (TSS), 3 mg/l Ammonia-Nitrogen (NH₃-N) and 4.0 mg/l minimum dissolved oxygen (DO). The effluent shall contain a chlorine residual of at least 1.0 mg/l and shall not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow and shall be monitored five times per week by grab sample for interim I phase and daily for interim II and final phases.

The treated effluent will be discharged into a ditch; then to an unnamed tributary; then to Medina River Below Medina Diversion Lake in Segment No. 1903 of the San Antonio River Basin. The unclassified receiving water uses are not significant aquatic life uses for the ditch and limited aquatic life uses for the unnamed tributary. The designated uses for Segment No. 1903 are high aquatic life uses, public water supply, aquifer protection and contact recreation. Segment No. 1903 is not currently listed on the state's inventory of impaired and threatened waters [the 2002 Clean Water Act Section 303(d) list]. The effluent limitations in the draft permit will maintain and protect the existing instream uses.

Sludge generated from the treatment facility will be hauled by a registered transporter and disposed of at a TCEQ permitted landfill, Covell Gardens RDF, in Bexar County. The draft permit authorizes the disposal of sludge only at a TCEQ registered or permitted land application site, commercial land application site, or co-disposal landfill. The ED does not expect the discharge from this permit action to have an effect on any federal endangered or threatened aquatic or aquatic dependent species or proposed species or their critical habitat.

The application was received on October 20, 2005 and declared administratively

complete on December 5, 2005. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published on December 23, 2005 in the *San Antonio Express News*. The ED completed the technical review on January 26, 2006 and prepared a draft permit. The Notice of Application and Preliminary Decision was published on March 17, 2006 in the *San Antonio Express News*. The comment period ended on April 17, 2006.

In response to the notices, the TCEQ received two requests for contested case hearing on behalf of the San Antonio Water System (SAWS). OPIC recommends granting SAWS' request for a contested case hearing and referring the matter to the State Office of Administrative Hearings (SOAH).

II. REQUIREMENTS OF APPLICABLE LAW

A. Requests for Contested Case Hearing

This application was declared administratively complete on December 5, 2005. Because the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Texas Water Code § 5.556 added by Acts 1999, 76th Leg., ch 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment

period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TAC § 55.201(d).

Under 30 TAC § 55.203(a), an affected person is “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restriction or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

The Commission shall grant an affected person’s timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission’s decision on the application. 30 TAC § 55.211(c).

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;

- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

III. DISCUSSION

A. Determination of Affected Person Status

SAWS submitted hearing requests from both Dwayne Rathburn, Manager of Program Planning, and attorney Joe Freeland. Since Mr. Freeland's letter encompasses all of Mr. Rathburn's primary points and provides additional detail, OPIC will concentrate its evaluation on the Freeland letter.

SAWS claims it has a justiciable interest in this matter because SAWS operates an adjacent sewer system with capacity to treat the wastewater proposed to be treated by the facility for which the Applicant is seeking a permit. The proposed wastewater treatment facility and collection system feeding the facility would be located immediately adjacent to the corporate limits of the City of San Antonio and inside San Antonio's extraterritorial jurisdiction (ETJ). The facility would be located within approximately 2900 feet from the existing SAWS lift station that transports wastewater to SAWS' Medio Creek wastewater treatment plant. SAWS plans to serve the tracts to be served by the proposed facility. SAWS included these tracts in a wastewater impact fee service area that was approved by the San Antonio City Council in July 2004 and again in June 2006. SAWS "is willing to accept and treat the proposed wastewater and...believes that a privately owned treatment facility in this location is inconsistent with policies supporting regionalization, including Texas Water Code § 26.0282, and SAWS' goal of

providing high quality wastewater treatment services in the most efficient and economical long-term basis for the area.” SAWS also states that the City of San Antonio has delegated to SAWS by ordinance its enforcement authority to regulate nuisances within 5000 feet of its corporate limits. SAWS concludes that it has an interest in the issuance of this permit and the terms and conditions contained therein.

Based on SAWS proximity to the proposed facility and its interest in serving the tracts proposed to be served by the Applicant, OPIC concludes that SAWS is an affected person. It has established an interest protected by the law under which this application will be considered. A reasonable relationship exists between the interest claimed and the activity regulated. There is a likely impact of the regulated activity on the health, safety and use of property of the person. There is a likely impact of the regulated activity on the use of the impacted natural resource by the person. Therefore, OPIC recommends finding that SAWS is an affected person.

B. Issues Raised in the Hearing Requests

1. Issues Disputed

a. Regionalization

In his response to the regionalization issue, the ED stated that the Domestic Wastewater Permit Application Technical Report requires information concerning regionalization of wastewater treatment plants. As part of the application process, the Applicant is required to review a three-mile area surrounding the proposed facility to determine if there is a wastewater treatment plant or sewer collection lines within the area that can be utilized. The wastewater treatment plant must have sufficient existing capacity to accept the additional waste. If such a

facility exists and it is willing to accept the proposed waste, the Applicant must provide an analysis of expenditures required to connect to the existing wastewater treatment facility. In its application, the Applicant stated there were no wastewater treatment plants within a three-mile radius. The closest treatment facility is over three miles away in another watershed and lacks sufficient existing capacity to serve the demands of the development. The Applicant also states that SAWS does have a 5-mile long force main that transports wastewater to the Medio Creek Wastewater Treatment Plant, but the existing capacity of the force main is also inadequate to serve the proposed development of 3,300 equivalent dwelling units. In addition, the facility is not located within any corporate city limits and is not within the CCN of any utility.

SAWS disputes the need for the facility to be permitted, particularly given the availability of existing areawide or regional waste collection, treatment and disposal systems. The Commission is charged by Texas Water Code § 26.0282 to consider the need for the issuance of a new wastewater permit based on regionalization. SAWS has collection facilities within 2900 feet of the area and has adequate transportation and treatment capacity to meet the demands of the proposed development. SAWS maintains that the Applicant has failed to justify the need for the construction of a new facility and has failed to adequately demonstrate that it would be economically unreasonable to use SAWS' existing facilities.

b. Adequacy of Notice

In response to SAWS' claim that it could not locate a copy of the discharge permit application at the Bexar County Clerk's Office, the ED replies that 30 TAC § 39.045(g) requires the Applicant to make the application documents available to a site accessible to the general

public for review and copying. On May 25, 2006, the Applicant submitted an application availability verification form to the Office of the Chief Clerk of the TCEQ certifying that a copy of the permit application, technical summary, draft permit, the ED's preliminary decision and all other related correspondence were available for public viewing and copying during the comment period at the Bexar County Courthouse, County Clerk's Office, 100 Dolorosa, San Antonio, Texas.

SAWS disputes the claim that the application documents were available at a site accessible to the general public. As a result, SAWS was unable to review the application documents and the draft permit and, therefore, unable to comment fully on the application and raise additional issues of concern.

2. Issues of Fact

Whether the proposed permit meets the regionalization requirements pursuant to Tex. Water Code § 26.0282 is an appropriate question of fact appropriate for referral to the State Office of Administrative Hearings (SOAH). Similarly, whether the Applicant met the notice requirements of 30 TAC § 39.405(g) is an appropriate question of fact for referral to the State Office of Administrative Hearings.

3. Issues Raised During the Comment Period

Questions regarding compliance with regionalization were raised in a timely manner during the comment period. Questions regarding notice and the availability of the application were also raised in a timely manner during the comment period.

4. Relevant and Material Issues

The hearing request raises issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). Pursuant to Tex. Water Code § 26.0282, the Commission must consider the need for the issuance of a new wastewater permit based on regionalization. In addition, the Commission must consider whether the Applicant provided adequate notice pursuant to 30 TAC § 39.405(g).

5. Issues Recommended for Referral to Hearing

In light of the requirements of 30 TAC §§ 50.115(b) and 55.211(b)(3)(A)(I), OPIC recommends that the Commission refer the following disputed issues of fact to SOAH:

1. Is there a need for the issuance of the proposed permit based on regionalization?
2. Did the Applicant provide adequate notice/availability of the application?

OPIC recommends that SOAH treat the second issue as a preliminary issue. If the Administrative Law Judge (ALJ) concludes that notice was not adequate, the ALJ should allow SAWS an appropriate amount of time to review the application and possibly add additional issues to be considered during the hearing. However, if the ALJ concludes that notice was adequate, no further action would be required for the second issue.

C. Maximum Expected Duration of Hearing

Commission rule 30 TAC § 50.115(d) requires that any commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to

issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

OPIC recommends granting SAWS' requests for a contested case hearing with the above-referenced issues and a recommended duration of six months.

Respectfully submitted,

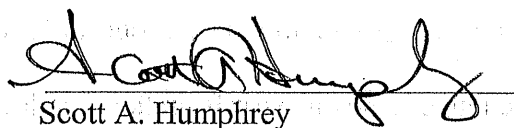
Blas J. Coy, Jr.
Public Interest Counsel

By 

Scott A. Humphrey
Assistant Public Interest Counsel
(512)239-6363 PHONE
(512)239-6377 FAX

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2006 the original and eleven true and correct copies of the Office of the Public Counsel's Response to the Request for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via facsimile transmission, and Inter-Agency Mail or by deposit in the U.S. Mail.


Scott A. Humphrey

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TCEQ DOCKET NO. 2006-0884-MWD

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REPORT OF THE
COMMISSIONER OF THE
LAND OFFICE

The following is a list of the
lands which have been
acquired by the
Government since the
last report of the
Commissioner of the
Land Office.

The lands were acquired
by purchase from the
private owners, and
are now in the
possession of the
Government.

The lands are situated
in the following
localities:

1. In the
vicinity of the
city of
Washington.

2. In the
vicinity of the
city of
New York.

3. In the
vicinity of the
city of
Philadelphia.

4. In the
vicinity of the
city of
Baltimore.

5. In the
vicinity of the
city of
Boston.

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vicinity of the
city of
Baltimore.

5. In the
vicinity of the
city of
Boston.

6. In the
vicinity of the
city of
New Orleans.